Charles C. Wehner, Esq. SBN 098710
Stephen T. Hodge, Esq. SBN 158273
WEHNER AND PERLMAN
11100 Santa Monica Blvd., Suite 800
Los Angeles, CA 90025-3302
Tel: (310) 478-3131
Fax: (310) 312-0078

Attorneys for Appellee William Simon

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT REYNOLDS and THE ESTATE OF DALE C. ECKERT CORPORATION, Appellants, vs. PHILIP B. WAGNER and WILLIAM SIMON, Appellees.	NO.93-56629 DIST CT. NO. SAVCB91-395 GLT NOTICE OF MOTION AND MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION OF CHARLES C. WEHNER [SEPARATE EXHIBIT VOLUME FILED CONCURRENTLY HEREWITH]

TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, as soon as the matter may be heard in the above-entitled Court, located at 121 Spear Street, San Francisco, California, Appellee William

Simon will, and hereby does, move the Court for an order dismissing the appeal of Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert) for lack of subject matter jurisdiction.

This motion is brought pursuant to Federal Rule of Appellate Procedure 27, and will be based upon this notice, the attached memorandum of points and authorities, the attached declaration, the exhibits included herewith, all pleadings and papers on file herein, and upon such oral or documentary evidence which may be presented at the hearing of this Motion.

DATED: December 10, 1993

Respectfully submitted,

WEHNER AND PERLMAN
Charles C. Wehner, Esq.
Stephen T. Hodge, Esq.

By: /s/ Charles C. Wehner
CHARLES C. WEHNER
Attorneys for Appellee
William Simon

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter arises from the filing of an untimely and improper notice of appeal by Appellant Estate of Dale C. Eckert Corporation (Estate of Eckert), after the District Court entered judgment against the Estate of Eckert and Grant Reynolds, and in favor of defendants in the action below, Philip B. Wagner and William Simon, on September 1, 1993. (*See* District Court's September 1, 1993 Judgment, included herewith as Exhibit A.) Pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure,[1] the Estate of Eckert was then required to file its notice of appeal, if an appeal were contemplated, within "30 days after the date of entry of the judgment or order appealed

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[1] Unless specifically stated otherwise, all rules cited herein refer to the Federal Rules of Appellate Procedure.

from." In other words, the Estate of Eckert had until October 1, 1993, to file its appeal. It failed to do so.

Instead, on October 4, 1993, the Estate of Eckert filed a motion to extend the time within which to file a notice of appeal. (Estate of Eckert's Motion For Extension of Time for Filing Notice of Appeal, included herewith as Exhibit B.) The motion was based on appellant's indecision whether to pursue an appeal, and argued that such indecision constituted "good cause" to extend the time to appeal beyond the 30-day limit. (Exhibit B, at 2-3.) Both Mr. Simon and Mr. Wagner opposed the motion on the grounds that (1) the Estate of Eckert had made no showing of good cause, (2) the good cause standard was inapplicable since the 30-day period had expired, and (3) no excusable neglect was present in this case, nor could the record support such a finding. (*See* Simon Opp. and Wagner Opp., included herewith respectively as Exhibits C and D.) After taking the matter under submission without hearing, the District Court, on October 28, 1993, granted the Estate of Eckert's motion and ordered that a notice of appeal be filed no later than November 15, 1993. (October 28, 1993 Minute Order, included herewith as Exhibit F.) Accordingly, the Estate of Eckert filed its appeal on November 15, 1993.[2] (Exhibit G.)

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[2] Mr. Reynolds, a plaintiff in the underlying case, did not appeal the District Court's decision. In actuality, neither did the Estate of Eckert since its notice of appeal was not served on counsel for appellee Simon (despite the proof of service to the contrary). Rather, Mr. Simon finally received notice of the appeal on November 29, 1993, apparently from the Clerk of the Court. (*See* Wehner Decl.) Failure to timely serve a notice of appeal may require that it be stricken. Fed. R. Civ. P. 5; *see*

It is respectfully submitted that the instant appeal should be dismissed for lack of subject matter jurisdiction. Appellant failed to comply with Rule 4(a)(1) by waiting until after the expiration of the 30-day period to ask for an extension, and thereafter failed to establish a sufficient showing under Rule 4(a)(5) to warrant the granting of an extension. As a result, the appeal of the Estate of Eckert was untimely and improper, and should be dismissed.

II. STANDARD OF REVIEW

The standard for reviewing a district court's order granting an extension of time to file an appeal is abuse of discretion. *See, e.g., Oregon v. Champion Int'l Corp.*, 680 F.2d 1300 (9th Cir. 1982). A court abuses its discretion when it bases its decision on an erroneous conclusion of law or when the record contains no evidence on which it could rationally have based its decision. *B.P. North America Trading v. Vessel Panamax Nova*, 784 F.2d 975, 976-77 (9th Cir. 1986).

Kramer, Levin, Nessen, Kamin & Frankel v. Aronoff, 638 F. Supp. 714 (S.D.N.Y. 1986) (a motion to strike a plea may be granted if plea has been filed irregularly, is not sworn to, if that is required, or warrants signature of counsel, or any defect of that character).

III. AS A MATTER OF LAW, NO GOOD CAUSE EXISTED FOR THE EXTENSION OF THE ESTATE OF ECKERT'S TIME TO FILE A NOTICE OF APPEAL

As stated above, the Estate of Eckert failed to file a notice of appeal within 30 days after a judgment was entered against it on September 1, 1993. Fed. R. App. P. 4(a)(1); *see* Exhibit F. This time limit is mandatory and jurisdictional. *Browder v. Department of Corrections*, 434 U.S. 257 (1978); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992); *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 908-09 (7th Cir. 1989). However, a party may, within 30 days after the expiration of the time to appeal, move to extend the time to file an appeal under Rule 4(a)(5) upon a showing of good cause or excusable neglect. *See* Fed. R. App. P. 4(a)(5).

If a party does not move for an extension of time within the 30-day period set forth in Rule 4(a)(1), *the good cause standard is inapplicable and the party must meet the higher burden of excusable neglect. Oregon v. Champion Int'l Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *see also Pearson v. Gatto*, 933 F.2d 521, 524 (7th Cir. 1991); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Consolidated Freightways Corp. v. Larson*, 827 F.2d 916 (3d Cir. 1987), *cert. denied*, 484 U.S. 1032 (1988); *In re Cosmopolitan Aviation Corp.*, 763 F.2d 507 (2d Cir.), *cert. denied sub nom., Rothman v. New York State Dep't of Transp.*, 474 U.S. 1032 (1985). As stated by this Court in *Champion Int'l Corp.*:

> "good cause" . . . is applicable only where a motion is filed before the [expiration] of the thirty-day period. The good cause language was added to the Rule [4(a)(5)] by a 1979 amendment because the excusable neglect standard "never

> fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time." Advisory Committee Notes to 1979 amendment to Fed. R. App. P. 4(a)(5); *see 9 Moore's Federal Practice* ¶ 204.13[I.-1] (2d ed. 1980).

Champion Int'l Corp., 680 F.2d at 1301. This interpretation is consistent with that made by the *Pearson* court:

> The advisory notes to Rule 4(a)(5) make clear that a request for an extension of time filed *before* the notice of appeal is due may be granted for good cause, but a request for extension filed *after* the notice is due may only be granted under the higher excusable neglect standard.

Pearson, 933 F.2d at 524; *see also Allied Steel*, 909 F.2d at 143 n.3 (good cause standard not considered because appellant did not request an extension before expiration of the 30-day appeal time set by Rule 4(a)(1)).

Here, the Estate of Eckert waited until October 4, 1993, 33 days after entry of judgment, to move to extend the time in which to appeal the District Court's decision. (Exhibit B.) Although the good cause standard no longer applied and Appellant was required to make a showing of excusable neglect in support of its motion, Appellant's motion *was based solely on purported good cause*. (*See* Exhibit B, at 2-3.) Thus, Appellant's motion to extend the appeal time in this case should not have been granted.

Additionally, the rationale offered by the Estate of Eckert, i.e., that it needed additional time to determine

whether to pursue an appeal, was not good cause.[3] Good cause refers to circumstances beyond a party's control, such as a mistake or delay by court personnel. *See Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980) (court's delay in filing a notice after timely receiving it, constituted good cause); *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990) (justifiable reliance on clerk's erroneous information regarding time to appeal constituted good cause). Conversely, *circumstances within a party's control do not constitute good cause. See Pontarelli v. Stone*, 930 F.2d 104 (1st Cir. 1991) (counsel's mistake in referring to parties with the term *"et al."* did not constitute good cause); *Wright v. Deyton*, 757 F.2d 1253, 1255 n.5 (11th Cir. 1985) ("a litigant cannot sit idly by and allow his filing deadline to approach and then argue that compliance with the deadline should be excused since his letter was posted in sufficient time to meet the deadline if the mail had followed its ordinary course"). Accordingly, Appellant's motion to extend the appeal time in this case should not have been granted.

IV. THE ESTATE OF ECKERT DID NOT MAKE, NOR COULD IT HAVE MADE, A SHOWING OF EXCUSABLE NEGLECT TO SUPPORT ITS MOTION TO EXTEND THE APPEAL TIME

Since Appellant's motion to extend the appeal time in this case was not filed within the original 30-day period, it was incumbent upon Appellant to make a showing of

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[3] Appellant contended that it had been "unable to schedule a meeting" wherein it could obtain the trustee's instruction regarding appeal. (Exhibit B, at 3:20-22.)

excusable neglect to have adequate grounds for the granting of its motion. *See, e.g., Champion Int'l Corp.*, 680 F.2d at 1301 (and cases cited above). It failed to do so and relied wholly on the alleged good cause of needing additional time in which to decide whether to pursue an appeal. (*See* Exhibit B.) Thus, the motion of the Estate of Eckert was unsupported by the requisite showing of excusable neglect, and there was an insufficient basis upon which to extend the appeal time in this case.

Although Appellant did not argue that excusable neglect was present in this case (*see* Exhibits B and E), assuming *arguendo* that the grounds stated could be interpreted as an argument for excusable neglect, that argument fails as a matter of law. This Court has made clear that the standard for determining excusable neglect "is a 'strict' one." *Champion Int'l Corp.*, 680 F.2d at 1301 (citing *Selph v. Council of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979) (quoting Advisory Committee Notes to 1966 amendment to Fed. R. Civ. P. 73, the predecessor of Fed. R. App. P. 4(a))). "Inadvertence or mistake of counsel does not constitute excusable neglect. Nor does clerical error by counsel's staff." *Champion Int'l Corp.*, 680 F.2d at 1301 (citations omitted). Ample authority limits excusable neglect to the occurrence of unusual circumstances that cause injustice to a party, or to uncontrollable and unpredictable events beyond a party's control. *See Pearson*, 933 F.2d at 524.

Moreover, the court in *Allied Steel*, in interpreting the scope of Rule 4(a)(5), stated that "Rule 4(a)(5) clearly indicates that potential appellants *may not regard the period during which a district court may extend the time for filing a notice of appeal as a further period in which to ponder*

their options." Allied Steel, 909 F.2d at 143 (emphasis added).[4] This decision is in accord with the decisions of other courts.

For example, in *Cleek Aviation v. United States*, 22 Cl. Ct. 260, 261 (1991), it was held that indecision as to whether to appeal did not constitute excusable neglect for failure to timely file a notice of appeal. The potential appellant in *Cleek* had filed its notice of appeal the day after the deadline expired, in violation of Rule 4(a)(1). *Id.* at 261. Although the potential appellant's counsel argued that he was delayed in filing a notice of appeal because he was awaiting additional instruction from his client regarding whether to appeal, and that he should therefore have been allowed an extension of time, the court held that indecision as to whether to appeal did not constitute a basis for failure to timely file a notice of appeal. *Id.* at 262. *See also Gann v. Smith*, 442 F.2d 352, 353 (5th Cir. 1971) (the fact that State Attorney General changed his mind about appealing decision was not excusable neglect); *Nichols-Morris Corp. v. Morris*, 279 F.2d 81, 83, (2d Cir. 1960) (client's inability to make a decision on appeal was not excusable neglect); *United States v. Virginia*, 508 F. Supp. 187, 189-90 (E.D. Va. 1981) (indecisiveness of Solicitor General of United States did not constitute excusable neglect).

Here, the Estate of Eckert offered no justification to extend the time to file an appeal in this case other than its

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[4] The *Allied Steel* interpretation of Rule 4(a)(5) indicates that a potential appellant's request to extend the time to file a notice of appeal while it ponders its options, does not constitute either excusable neglect *or* good cause.

desire to have additional time in which to decide whether to pursue an appeal. In fact, Appellant stated that it might decide not to pursue an appeal, but it just wanted time to consider the option. (Exhibit E, at 3:19-22.) Because such a rationale does not, as a matter of law, constitute excusable neglect, there was no basis upon which the District Court could have reasonably based its decision to grant an extension to Appellant.

V. THE EXTENSION OF TIME GRANTED EXCEEDED THE TIME ALLOWED BY THE FEDERAL RULES OF APPELLATE PROCEDURE

A further reason exists to grant Mr. Simon's motion to dismiss the instant appeal in that the extension of time granted by the District Court exceeded the time allowed by the Federal Rules of Appellate Procedure. Rule 4(a)(5) allows an extension of time, after the proper showing (which has not been made in this case), "not later than 30 days after the expiration of the time prescribed by . . . Rule 4(a)[(1)]. . . . or 10 days from the date of entry of the order granting the motion, *whichever occurs later.*" (Emphasis added.) Accordingly, since the order granting the motion to extend the appeal time was entered on October 28, 1993, *the latest possible time to extend the appeal was November 8, 1993.*[5]

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[5] The original appeal time expired on October 1, 1993, and 30 days after was October 31, 1993. (Since October 31, 1993 was a Sunday, it assumed that the time would have extended to November 1, 1993.) However, the District Court's order granting appellant an extension was entered on October 28, 1993; 10 days after that date was November 7, 1993, a Sunday. Thus, the

Despite this fact, the Estate of Eckert was granted an extension of time until November 15, 1993. (Exhibit F.) The law is well settled that the District Court lacked authority to extend the Estate of Eckert's appeal time beyond that allowed by Rule 4(a)(5). *Certain Underwriters at Lloyds of London v. Evans*, 896 F.2d 1255, 1256 (10th Cir. 1990). The law is equally well settled that if the District Court abused its discretion by extending the time for appeal beyond that contemplated by the Rules, this Court is without jurisdiction. *Rodgers v. Watt*, 722 F.2d 456, 458 (9th Cir. 1983); *see Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991); *McCalden v. California Library Ass'n*, 919 F.2d 538 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 n.1 (9th Cir. 1989).

Additionally, it is respectfully asserted that this Court could not, even if it were disposed to do so, suspend the Rules regarding the time provisions for filing of a notice of appeal. Suspension of the Rules is governed by Rule 2, which states that the rules may be suspended "[i]n the interest of expediting decision, or for other good cause shown,. . . . *except as otherwise provided in Rule 26(b).*" (Emphasis added.) Rule 26(b) states that the Court may enlarge time under the Rules, but that it *"may not enlarge the time for filing a notice of appeal."* (Emphasis added.) Thus, appeal of the Estate of Eckert, being untimely, should be dismissed for lack of jurisdiction.

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latest possible date to extend the appeal time in this case was November 8, 1993.

VI. CONCLUSION

For the all the foregoing reasons, Appellee Simon respectfully requests that the Court grant his motion to dismiss the appeal of the Estate of Eckert, as well as any other and further relief that the Court deems appropriate.

DATED: December ___, 1993

Respectfully submitted,

WEHNER AND PERLMAN
Charles C. Wehner, Esq.
Stephen T. Hodge, Esq.

By: /s/ Charles C. Wehner
CHARLES C. WEHNER
Attorneys for Appellee
William Simon

DECLARATION OF CHARLES C. WEHNER

I, CHARLES C. WEHNER, hereby declare as follows:

1. I am an attorney at law properly admitted to practice before all the courts of the State of California, and before the United States Court of Appeals for the Ninth Circuit, and am a partner in the law firm of Wehner and Perlman, attorneys for Appellee, William Simon. The following facts are within my personal knowledge and, if sworn as a witness, I could and would competently testify thereto.

2. On November 29, 1993, I received a notice of appeal in this case from the Clerk of the Court the Notice of Appeal.

3. I had not previously received the notice of appeal from Appellant's counsel.

4. A true and correct copy of the District Court's judgment in this case, which was entered on September 1, 1993, is included herewith as Exhibit A.

5. A true and correct copy of the Notice of Motion and Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, filed with the District Court on October 4, 1993, is included herewith as Exhibit B.

6. A true and correct copy of Appellee William Simon's Memorandum of Points and Authorities in Opposition to the Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, is included herewith as Exhibit C.

7. A true and correct copy of Appellee Philip Wagner's Memorandum of Points and Authorities in Opposition to the Motion of the Estate of Eckert for Extension of Time for Filing Notice of Appeal, is included herewith as Exhibit D.

8. A true and correct copy of the Estate of Eckert's Reply Memorandum in Support of Motion for Additional Time to File Notice of Appeal is included herewith as Exhibit E.

9. A true and correct copy of the District Court's October 28, 1993 Minute Order, granting the Estate of Eckert until November 15, 1993 to file its notice of appeal, is included herewith as Exhibit F.

10. A true and correct copy of the Notice of Appeal filed by the Estate of Eckert on November 15, 1993, is included herewith as Exhibit G.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10 the day of December, 1993, at Los Angeles, California.

/s/ Charles C. Wehner
Charles C. Wehner